ROHIMI YUSOFF

v.

ALFA MELI MARKETING SDN BHD & ANOR

HIGH COURT, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R2-25-90-1999]
8 AUGUST 2000

LABOUR LAW: *Employment - Dismissal - Whether claimant was justly dismissed - Whether inability to generate business for company justifies dismissal - Whether evidence showed claimant was difficult to work with - Whether unpleaded evidence should be taken into account*

ADMINISTRATIVE LAW: *Remedies - Certiorari and mandamus, application for - Industrial Court - Whether decision tainted with irregularities - Whether there should be a re-trial of claim*

The applicant was employed by the 1st respondent ("the company") as marketing manager. Soon after, the applicant's employment was terminated. The Industrial Court concluded that the termination of the claimant was with just cause and excuse and had dismissed the claimant's claim. The said court was satisfied from the evidence that it was because of the claimant's inability to generate business for the company as that was the sole purpose and object of the claimant as marketing manager. Hence, the applicant's instant application for an order of *certiorari* to quash the award and for an order of *mandamus* for a rehearing before another chairman of the Industrial Court.

Held:

[1] It was stated in the termination letter that the dismissal was because all the key personnel of the company had difficulties in working with the claimant. However, there was no evidence that all key personnel cannot get along with the claimant. In fact, all the witnesses stated the opposite.

[2] The industrial court had erred in law when it arrived at a decision based on a matter that was not pleaded by the company. The claimant was dismissed without any warning and was working with the company for ten weeks only. It was too early to say that the claimant had failed to generate business during that period. Furthermore, even if the dismissal was because of the latter, it did not justify a dismissal because that reason was not pleaded and the employer did not try to remedy it.

[3] The chairman had erred in law when he made the decision in favour of the company and held that the dismissal of the claimant was with just cause and excuse on the basis of unpleaded evidence. Therefore, *certiorari* to quash the award was granted.

[4] In view of the fact that the chairman had made a clear finding that all the reasons stated in the pleadings were without merit and that there was no culpability on the part of the claimant, thus a re-trial of the claim is an exercise in futility.

[Application allowed.]

Case(s) referred to:
Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 2 MLJ 129 ***(refd)***
Healthcare Medical Screening Centre (M) Sdn Bhd v. Raymund Dominic Ignatius Louis [1997] 3 ILR 879 ***(refd)***
IE Project Sdn. Bhd. v. Tan Lee Seng [1987] 1 ILR 165 ***(refd)***
Lee Nyoke Hin of Syarikat Pengangkutan Bas Kilang/Bas Sekolah v. Kumaran V Kathirvello [1992] 2 ILR 132 ***(refd)***
Oriflame Marketing (M) Sdn. Bhd. v. Quah Jin Kok [1995] 1 ILR 170 ***(refd)***
SME Technologies Sdn. Bhd. v. Ranjit Singh Gurdian Singh [1994] 2 ILR 1140 ***(refd)***
R. Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(refd)***

For the applicant - T Vijay; M/s T Vijay & Co
For the respondent - DC Alfred & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Faiza Tamby Chik J:

This is the applicant's application for an order of *certiorari* to quash the award of the Industrial Court No. 333 of 1999 which was handed down on 7 July 1999. The facts relevant to this application are as follows: The applicant was offered employment in the 1st respondent's service as marketing manager at a monthly salary of RM5,000 with a company car provided. The applicant was to "generate enough business so that the company can maintain your salary, overhead costs and profit:. (See COA1-2 p. 1 at para. 3 and p. 2 at para. 7). The applicant joined the service of the 1st respondent on 22 September 1997. By the 1st respondent's letter dated 29 November 1997 the applicant's employment with it was terminated with one month's salary to be paid *in lieu* of notice (COA7). The reasons for the termination were explained as "that you were recruited by the company primarily to sell the

products manufactured by Alfa-Meli Precision Industries Sdn. Bhd. (AMPI). However all the key personnel of AMPI indicated to me that they have difficulties in working with you. In view of this, you will not be in a position to market the products of AMPI and under such circumstances your service with the company is no longer required". The applicant then made representations to the director of Industrial Relations to be reinstated to his former employment. When the representations could not be settled, the representations were referred by the Minister of Human Resources to the Industrial Court for an award. The Industrial Court after hearing the evidence of several witnesses came to the conclusion that the termination of the claimant was done with just cause and excuse and dismissed the claimant's claim. Hence, the applicant's instant application for an order of *certiorari* to quash the award and for an order of *mandamus* for a rehearing before another chairman of the Industrial Court.

It is observed that the claimant was dismissed without any warning and was working with AMPI just for ten weeks only. It was too early to say that the claimant failed to generate the business during that period. In the case of *SME Technologies Sdn Bhd v. Ranjit Singh Gurdian Singh* [1994] 2 ILR 1140 the Industrial Court stated:

> In the instant case there is no documentary evidence produced to support the Company's contention that the Claimant's performance during his probationary period was unsatisfactory. There has been no written warning or communication to the Claimant informing him of his poor performance or inefficiency. What is before the Court are mere allegations by COW1 and COW2 of the Claimant's unsatisfactory performance. Moreover there is evidence that another person has been appointed by the Company to take the job of security officer and the Claimant has said he believes this is the reason that he was transferred to another post and later dismissed. After a careful scrutiny of the evidence I find that the Company's allegation against the Claimant has not been proven and the evidence the Company has produced in support of its reason for the dismissal is unconvincing or unacceptable as basis for a justified dismissal. In the final analysis the Company has failed to discharge the burden of proving that the Claimant was dismissed for just cause and excuse.

It is also observed that the Industrial Court erred in law when it arrived at a decision based on a matter that was not pleaded by the 1st respondent when the Industrial Court held as follows:

> Be that as it may, the court is satisfied from the evidence as a whole that it was the inability of the claimant to generate income and sales that had caused the disappointment in COW1 to change his mind because that was the sole purpose and object of appointing the claimant as the number one man for marketing AMPI's product.

The charge of the Company (COA7) reflects this as the predominant reason of COW1 terminating the claimant.

> ... The failure of the claimant on this condition precedent, justified in contractual terms the non-issuance of the contract of employment document to the Claimant by COW1.

It is trite law that parties are bound by their pleadings. Authority for this proposition is Federal court case of *R. Rama Chandran v. The Industrial court of Malaysia & Anor* [1997] 1 CLJ 147 at p. 162 of the report:

> (Per Eusoff Chin Chief Justice) It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regard to the issues. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. In this case, the Industrial court had totally failed to consider the allegations of misconduct but simply concluded that because the letter of termination was grounded on retrenchment exercise, it was not bound and therefore not obliged to consider the issues of bias and misconduct (see p. 278B-D).

Again in *Goon Kwee Phoy v. J & P Coats (M) Bhd.* [1981] 2 MLJ 129 at p. 136 Raja Azlan CJ (Malaya) (as DYMM then was) said:

> We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

It was plain in the instant case that the termination letter stated clearly that the dismissal was because all the key personnel of the company indicated that they have difficulties in working with the claimant. However at the Industrial Court the company in the pleadings gave different reasons for the termination (statement in reply in para. 6) (encl. 4 exh. RY7). Para. 6 of statement in reply stated as follows:

The Company contends that the claimant was terminated pursuant to allegation of serious misconduct leveled against him as follows:

(a) Making dishonest claim;

(b) Late coming to office;

(c) Habit of taking and demanding loan from office mate

The chairman in his award made a finding in p. 9 of the award that the allegation were without merit. He said as follows (p. 9 of the award (encl. 4 exh. RY10):

> Up to this stage, all the charges of the Company is a matter of 'touch and go' and there is nothing substantial in their evidence of claimant's culpability. If there is one glaring fault on the part of the Company, it is that the Company has not handled the entire episode with professionalism from inception when COW1 readily took in the claimant and later regretting it.

Later at p. 12 of the said award the chairman said:

> Be that as it may, the court is satisfied from the evidence as a whole that it was the inability of the claimant to generate income and sales that had caused the disappointment in COW1 to change his mind because that was the sole purpose and object of appointing the claimant as the number one man for marketing AMPI's product.

The charge of the Company (COA7) neglects this as the predominant reason of COW1 terminating the claimant.

The above statements by the chairman must be seen in the light of the evidence adduced by COW2, 3 and 4 and COA7 which were:

(i) The COW2 in his evidence (Re-exam) p. 34 note of evidence (encl. 4 exh. RY13) said clearly:

> I confirm that the Non-Performance of the claimant in the sales is not the company's grounds for claimant's termination.

(ii) Page 49 of notes of evidence COW2 said as follows:

> My relationship with the claimant is cordial.

(iii) Page 35 of notes of evidence COW3 said as follows:

> We are friends as far as working relationship with the claimant.

It was obvious from the above that there was no evidence that all key personnel cannot get along with the claimant, in fact all the witnesses stated the exact opposite.

Allegation of misconduct was not stated in the termination letter. It was only raised by the company in the pleadings. In *Oriflame Marketing (M) Sdn. Bhd. v. Quah Jin Kok* [1995] 1 ILR 170 at p. 173 the Industrial court said:

> In the present case the reason for dismissal was "relieve of your duties effective immediately" in a one sentence letter of termination and nothing more. In the hearing before the Industrial Court several other matters of serious misconduct were averred as grounds for dismissal. I am surprised when the reason for dismissal was a set of facts known to the company at the material time of its action why could not the reason be stated in the termination letter and made known to the claimant. Why should this set of relevant facts which would justify its action be locked in its bosom and produced at the very last moment at the Industrial Court. This court would not encourage the practice of "dismissal first and find the reason for dismissal later". The time at which one looks at the reason for dismissal is the time of dismissal. The court must consider that the employer treats as the reason when he gives a reason for dismissal at the material time in the light of equity, good conscience and substantial merits of the case.

Even if the dismissal was because of inability to generate business, I am of the view that, that reason did not justify dismissal. Because firstly that reason was not pleaded and secondly the employer did not try to remedy it. In *Lee Nyoke Hin of Syarikat Pengangkutan Bas Kilang/Bas Sekolah v. Kumaran V Kathirvello* [1992] 2 ILR 132 at p. 134-135 the Industrial Court stated:

> The Industrial has repeatedly emphasised in several awards that the age of firing an employee at the first sign of laziness or unsatisfactory performance, is past, and belongs to a bygone era as today, security of tenure of employment is a fundamental principle in employment law and industrial relations. Unless a workman is incorrigible, an employer should try to rectify or remedy the shortcomings of an unsatisfactory employee, before resorting to dismissal. This principle has been amplified in the two Awards below:

In the case of *Rooftech Sdn. Bhd. v. Holiday Inn* Award No. 166/86 the Industrial Court stated:

> Inefficiency which discloses a course of negative conduct no doubt is a sufficient ground for termination but there must necessarily be sufficient proof that a procedure has been followed. Ordinarily there must be sufficient written communication to the Claimant in order to establish inefficiency or poor performance before the Company can rely on it to justify dismissal. The Company has failed to do so.

In the case of *IE Project Sdn. Bhd. v. Tan Lee Seng* Award No. 56/1987 the Industrial Court states:

> An employer should be very slow to dismiss upon the ground that the employee is found to be unsatisfactory in his performance or incapable of performing the work which he is employed to do without first telling

> the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground and giving him an opportunity of improving his performance. It is for the employer to find out from the employee why he is performing unsatisfactorily or warn him that if he persists in doing so he may have to go. There is no record of any such warnings. On the contrary I am satisfied that the Claimant had performed his task to the best of his ability.

In *IE Project Sdn Bhd v. Tan Lee Seng* [1987] 1 ILR 165, the Industrial Court said at p. 167:

> The charge against the Claimant is for poor performance or defective performance coupled with his inability to work or get along with his subordinates which is certainly a charge of misconduct which necessitates an inquiry. Failure to hold an inquiry therefore was a blatant violation of the principles of natural justice. ...
>
> If an employee is measuring up to his job, it may be because he is not exercising himself sufficiently or it may be because he really lacks the capacity to do so. An employer should be very slow to dismiss upon the ground that the employee is found to be unsatisfactory in his performance or incapable of performing the work which he is employed to do without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground and giving him an opportunity of improving his performance. It is for the employer to find out from the employee why he is performing unsatisfactorily and to warn him that if he persists in doing so he may have to go.

In *Healthcare Medical Screening Centre (M) Sdn. Bhd. v. Raymund Dominic Ignatius Louis* [1997] 3 ILR 879 at pp. 883-884 Tuan Abu Hashim Abu Bakar said:

> On a security of the entire evidence, it becomes clear that the abrupt decision to terminate the claimant's services on 16 May, so soon after his confirmation, was really that it must be because the company alleges that claimant had "scolded" the female director, one Miss Chua, although the claimant denies this. Legally, the flaw on this averment, is that it was never pleaded by the company, which is fatal (see Eusoff Chin CJ in *Ramachandran*'s case). It surfaced only in the evidence of company witness, COW 1. Again her evidence is entirely heresay evidence, and if the company was serious on this, it is incumbent on them to have this witness testify in court. The fact the reason for termination was simply stated as "your work attitude was unsatisfactory" clearly shows the company never addressed this issue to lay appropriate charges at a domestic inquiry so as to satisfy the *Goon Kwee Phoy*'s test.

In the circumstances, I come to the conclusion that the chairman erred in law when he made the decision in favour of the company and held that the dismissal of the claimant was with just cause and excuse on the basis of unpleaded evidence. I therefore would grant *certiorari* to quash the said award. In view of the fact that the chairman had made a clear finding that "all the reasons stated in the pleadings are without merit and that there was no culpability on the part of the claimant", I am of the opinion that a re-trial of the claim, is an exercise in futility. The claimant was dismissed in 1997 October. He has been unemployed since. He is 49 years old, has a wife and two children. As Eusoff Chin, Chief Justice said in *R. Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147:

> (Per Eusoff Chin Chief Justice) As far as possible, the anxiety and endeavour of the Court should be to remedy an injustice when it is brought to its attention. On the facts of the case before the court, to remit this matter back to the Industrial Court would mean prolonging the dispute, which would hardly be fair or conducive to the interests of the parties. In the circumstances, justice demanded that to avoid further delay and expense, the Court should determine the consequential relief rather than remit the case to the Industrial Court for that purpose (see pp. 1841 and 185A).

In the event I order that compensation in the sum of RM10,000 *in lieu* of reinstatement is the appropriate remedy. The claimant's employment with the company lasted about ten weeks only and the usual award is that one month's salary for each year of service.

The said compensation sum should be paid to the claimant through his solicitors within two weeks from the date of this order.